

PRODUCT SECURITY AND TELECOMMUNICATIONS INFRASTRUCTURE BILL

ADDENDUM TO MEMORANDUM FOR THE JOINT COMMITTEE ON HUMAN RIGHTS

Introduction

1. This addendum to the memorandum for the Joint Committee on Human Rights for the Product Security and Telecommunications Infrastructure Bill (“the Bill”) addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to amendments to the Bill which the Government seeks to make at Report stage in the House of Lords (the “Amendments”).

ECHR issues raised by the Amendments

2. One of the Amendments engages Article 1 of the First Protocol (“A1P1”) (Right to peaceful enjoyment of possessions) of the ECHR and is compatible with the right set out in that Article. We have referred to all of the Amendments below for completeness.

Part 1 - Product Security

3. Amendments to Part 1 amend the resolution procedure from negative to affirmative resolution procedure for the Secretary of State’s powers to deem compliance with security requirements and to specify the conditions which a manufacturer must meet to be treated as complying with the requirement that the product is accompanied by a statement of compliance [Clause 3 and 9(7)].
4. They further amend clause 27 to provide that the Secretary of State’s power to delegate enforcement functions is to be exercised by regulations, rather than by written agreement, and that such regulations are subject to the affirmative resolution procedure.
5. These amendments serve to increase Parliamentary scrutiny in these areas and we do not consider that these amendments to Part 1 raise ECHR issues.

Part 2 - Telecommunications Infrastructure

New Clause (after Clause 60)

6. Paragraph 74 of the Electronic Communications Code (the “Code”) contains a right in respect of apparatus kept on or over land (the “main land”) by an operator (the “main operator”). This right permits the main operator to install and keep lines connected to that apparatus over other land (the “neighbouring land”) adjacent to, or in the vicinity of, the main land, subject to conditions and a right to object.
7. The new Clause expands paragraph 74 of the Code and confers the same right on operators other than the main operator (“other operators”), subject to the same conditions and right to object. It also confers new rights on the main operator and other operators to upgrade or carry out works to the apparatus for the purpose of, or in connection with, the flying of lines, subject to conditions.
8. These provisions engage A1P1 as they permit other operators to avail themselves of the right in paragraph 74 of the Code to install and keep lines which pass over neighbouring land, without the agreement of the occupiers of such land.¹
9. The new right for other operators to install and keep lines is subject to the same conditions applied to the corresponding right for the main operator. These are:
 - a. A duty to attach notices to overhead apparatus where the whole or part of the apparatus is at a height of three metres or more above the ground;
 - b. A requirement that prevents the lines from being installed at a height of less than three metres above the ground or within 2 metres of any building;
 - c. A right for landowners of neighbouring land to object to apparatus kept on such land at a height of three metres or more above the ground, and for landowners of main or neighbouring land to object to lines kept on such land, if the apparatus materially prejudices a landowner’s enjoyment, or interest in, their land.²

¹ The agreement of the occupiers of the main land is required before the rights in the Amendment are exercised.

² Exercising the right to object could result in the landowner obtaining a court order directing the operator to alter, move, remove or replace the apparatus (see Part 12 of the Code).

10. The new rights for operators to upgrade or carry out works to apparatus are subject to the right for a landowner of neighbouring land to object, if any such apparatus is at a height of 3 metres or more above the ground. They are also subject to further conditions, as follows:
 - a. the upgrade or works must have no more than a minimal adverse impact on the appearance of the apparatus;
 - b. the upgrade or works must have no more than a minimal adverse impact on the land; and
 - c. the upgrade or works must not cause loss, damage or expense to any person with an interest in the land.
11. Operators may not enter the main land in order to exercise the new rights to upgrade or carry out works to the apparatus, without first obtaining the agreement of the occupier of that land.
12. Other persons with an interest in the main land may be affected by these new rights without their agreement or without receiving payment for the operator's exercise of the right. The nature of the interest that many of these persons have in the land will mean they are less likely to be affected materially by the proposed amendment (for example, those persons with an easement), but for those who have a more significant interest in the land, the safeguards referred to in paragraph 11 above apply.
13. There has always been a clear public interest in the provision of electronic communications, and in such networks being upgraded to facilitate the deployment of better technologies. There will be a significant public benefit in permitting operators to carry out activities using the new rights in clause 61, particularly for rural areas with poorer connectivity.
14. The provision has a legitimate aim (the public interest of network connection) and the conditions imposed mean the exercise of the right can only be carried out in specific circumstances.

15. Given the conditions for the exercise of the rights are narrowly drawn, that the safeguards in place are robust and that the public interest benefit is compelling, DCMS considers that the provision is proportionate to the aim and strikes a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

16. DCMS therefore considers these provisions to be compatible with A1P1.

Other amendments to Part 2 of the Bill

Clause 57 and New clause (after clause 65)

17. The Government seeks to make two further amendments to Part 2 of the Bill. The Government does not consider that either of these give rise to potential human rights issues but, for completeness, these amendments are briefly addressed below.

18. The first of these amendments simply removes clause 57 from the Bill, since the need for this clause has fallen away following a recent Supreme Court judgment³ which delivers the Government's policy intention.

19. The second of these amendments inserts a new clause into the Bill which, by amending the Code, confers a new intervention power on the Secretary of State, exercisable in certain very limited circumstances. By exercising this power, through the giving of a certificate to the court, the Secretary of State can prevent the court from imposing an agreement conferring code rights on an operator. The Secretary of State is able to give such a certificate to the court where they are satisfied that imposition of an agreement would be likely to prejudice national security, defence or law enforcement. The Secretary of State is also required to give a copy of such a certificate to the operator.

20. The Government considers that Article 6 ECHR is most likely not engaged by this amendment, on the basis that the exercise of the new intervention power does not entail a determination of a civil right or obligation for the purposes of that Article. However, for completeness, if it were to be considered that Article 6 ECHR was engaged, we would highlight that the use of this power by the Secretary of State is in

³ *Cornerstone Telecommunications Infrastructure Ltd v Compton Beauchamp Estates Ltd* [2022] UKSC 18, judgment given on 22 June 2022.

any event still subject to judicial scrutiny; the operator would have an effective avenue of challenge for the purposes of Article 6 ECHR by way of an application for judicial review of the Secretary of State's decision to issue a certificate. As such, if Article 6 ECHR was engaged, the Government considers that this new provision would be compatible with its requirements.

Department for Digital, Culture, Media and Sport

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